STATE OF MICHIGAN

IN THE SUPREME COURT

(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)

SHANNON BITTERMAN,

Plaintiff-Appellant,

v

CHERYL D. BOLF,

Defendant-Appellee. /

Supreme Court No. 151520

Court of Appeals No. 319663

Lower Court No. 13-019397-CZ-2

DEFENDANT-APPELLEE'S BRIEF OPPOSING BITTERMAN'S APPLICATION FOR LEAVE TO APPEAL

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Should leave to appeal be denied (A) where, under the plain language of MCL 15.261 *et seq*., and *People v Whitney*, 228 Mich App 230, 253; 578 NW2d 329 (1998), a city clerk is not a public official subject to the Open Meetings Act because the clerk is not a member of a public body as defined in the Act, and (B) in any event the judgment is properly upheld on the alternate ground that there is no proof that Bolf intended to violate the Act?

Plaintiff-Appellant Shannon Bitterman answers "no."

Defendant-Appellee Cheryl D. Bolf answers "yes."

The Saginaw County Circuit Court answered that Bolf was not a public official. Given this ruling, the circuit court did not address whether Bolf intended to violate the Open Meetings Act. The circuit court also denied Bitterman's motion to compel answers to new depositions.

The Court of Appeals answered the Bolf was not a public official and also declined to address the alternate ground in support of the judgment in her favor.

COUNTER-STATEMENT OF APPELLATE JURISDICTION

This Court has discretion to decide whether to grant Bitterman's application for leave to appeal pursuant to MCR 7.301 and MCR 7.302, which was timely filed on April 30, 2015 after a Court of Appeals decision issued on April 14, 2015.

The Saginaw County Circuit Court issued an order granting summary disposition in favor of Defendant-Appellee Cheryl D. Bolf on October 29, 2013. Plaintiff-Appellant Shannon Bitterman moved for reconsideration, which was denied on December 2, 2013. Bitterman timely filed a claim of appeal on December 23, 2013. And after briefing and oral argument, the Court of Appeals issued its unpublished decision on April 15, 2015. The Court of Appeals addressed several issues not raised in Bitterman's application for leave to appeal. Relying on *People v Whitney*, 228 Mich App 230; 578 NW2d 329 (1998), the Court held that the term "public official" within the meaning of the Open Meetings Act, MCL 15.273, means that the individual is a member of a public body. That conclusion treats the meaning of "public official" consistently as it is used in the Open Meetings Act and makes sense in light of the language used and the context. The Court did not reach the alternate ground for affirmance.

The criteria set forth in MCR 7.302 offers guidance concerning the exercise of this Court's discretion and this case does not warrant the use of this Court's scarce time and judicial resources because the issue was correctly decided by the Court of Appeals, jurisprudence in this area is not unsettled, and further review is not needed.

Moreover, given that there is an alternate ground for affirmance, this case presents a poor candidate for review.

COUNTER-STATEMENT OF FACTS

A. Nature of the action.

Plaintiff-Appellant Shannon Bitterman brought this lawsuit under the Open Meetings Act, MCL 15.273, to challenge Defendant-Appellee Village of Oakley Clerk Cheryl Bolf's purportedly improper alteration to minutes of the Village of Oakley Board of Trustees meeting. Upon the parties' cross-motions for summary disposition, the Saginaw County Circuit Court granted summary disposition in Bolf's favor on the basis that she was not a member of a public body subject to liability under the Act. Bitterman unsuccessfully challenged that ruling on appeal.[1] Bitterman now seeks leave to appeal to challenge the lower courts' consistent conclusion that a "public official" within the meaning of the Open Meetings Act must be a member of a public body.

B. Material facts.[2]

This lawsuit concerns the minutes of the Village of Oakley Board of Trustees meeting that took place on November 8, 2012. (Exhibit A, Complaint)[3]. On that date,

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[1] Bitterman raised this same issue to the Court of Appeals' attention in a motion for peremptory reversal. Through that motion, Bitterman asserted that "[b]ecause the issue is so narrow and the error of the lower court so contrary to the universal rules of statutory interpretation," the Court could peremptorily reverse the lower court's opinion 'in lieu of full argument[.]" The Court of Appeals denied Bitterman's motion on January 30, 2014, on the basis that Bitterman failed "to persuade the Court of the existence of manifest error requiring reversal and warranting peremptory relief without argument or formal submission. (Exhibit H, Order, 1/30/14).

[2] These facts were accepted by Bolf for purposes of the motion and summary disposition only. (Exhibit D, Brief in Support of Defendant's Motion for Summary Disposition, p 4).

both an open meeting and a closed meeting took place. (Exhibit D-1, Bolf dep, pp 26, 35-36). The meeting began in open session, went into closed meeting, then returned to open session, from which it adjourned. (*Id.*).

Cheryl Bolf attended those meetings in her elected capacity as the Clerk of the Village of Oakley and took minutes. (*Id.*, p 11). At Village meetings, the Clerk takes handwritten notes, which she later types into a written format. (*Id.*, pp 14-15). Copies of these unapproved minutes are provided to the Trustees and read by the Clerk at the next meeting, at which they are approved. (*Id.*, pp 16, 19).

The meeting for the minutes at issue took place two days after a presidential election cycle and a Village election and, therefore, as testified by the Clerk, that "November was a very, very busy month." (*Id.*, pp 19, 45-46). As a result, the Clerk admittedly was scrambling to complete all of her duties and failed to complete the minutes of the open meeting that occurred on November 8, 2012, which she typed in chronologic order. She testified:

> When I type up the minutes I type them up—I typed up my closed minutes, I did not come back and type up opening a meeting back up; I completely forgot about it, got distracted. November was a very, very busy month. I did not type them in that that point. I didn't even think about it. I made the copies for it, got ready for the next meeting. (*Id.*, p 19).

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[3] All exhibits referenced in this document are in the lower court record and were attached to our brief on appeal filed in the Michigan Court of Appeals.

The unapproved minutes provided to the Board of Trustees therefore did not accurately reflect what had occurred at the open meeting. (Exhibit D-2, Unapproved minutes). The unapproved minutes were read aloud at the December Board meeting and approved by the Board without any corrections being made. (Exhibit C, Plaintiff's Motion for Summary Disposition). It was not until after the close of the December Board meeting that the error was noticed and pointed out to the Clerk:

> I believe it was shortly after the meeting. We were putting the chairs together and closing up the meeting and one of the trustees had said, "You didn't put that in there, did you? Weren't you supposed to put that in there?" I believe something like that. (Exhibit D-1, Bolf dep, p 20).

The Clerk was immediately concerned and brought it to the attention of the Village President, Doug Shindorf, who directed her to add the missing content to the minutes. (*Id*., pp 19-20). She believed that she was obligated to do so because of her duty as Clerk to correctly document what occurred. She explained:

> Q. And did you—When Mr. Shindorf asked you to add this information to these meeting minutes did you object or make any reference that you could not do such a thing?
>
> A. I was worried because I made a mistake. I was more worried about feeling bad about making a mistake. He said, "This is what happened, it needs to be in the minutes. This is an accurate description of what happened, you know, you're obligated to put this in. Go ahead and put it in. Don't worry about it."
>
> Q. Okay. Did you feel that you had a choice to say no if you wanted to?

> A. No. Because this is exactly what happened. I have a duty to present the minutes and accurately put them in. This is what happened, I just failed to type it back in there. (*Id*., pp 20-21).

Accordingly, at the direction of the Village President, the Clerk added in the previously omitted language to correctly reflect what had occurred at the meeting. (Exhibit D-1, Bolf dep, pp 21-22; Exhibit D-3, Approved minutes). The Clerk testified that it was not her intention to violate the OMA; she was attempting to comply with the OMA's purpose by providing a correct record to the public:

> Q. Ms. Bolf, when you made the changes to the approved minutes…was it your intent to violate a law?
>
> A. Absolutely not. I was trying to put the minutes as they were recorded. I made an error. I fixed it because I had to. This is what happened at the meeting. If I didn't it wouldn't be on record. (Exhibit D-1, p 56).

The December meeting minutes reflected that corrections had been made to the November minutes and those minutes were provided to and approved by the Board. (Exhibit D-4, December minutes).

C. Material proceedings.

Plaintiff-Appellant Shannon Bitterman filed this action in Saginaw County Circuit Court suing Defendant-Appellee Cheryl Bolf, the duly elected Clerk of the Village of Oakley. (Exhibit A, Complaint). Bitterman claimed that the Clerk was a public official under the Open Meetings Act and intentionally violated it by allegedly

altering approved written meeting minutes. (Exhibit A, Complaint ¶¶ 20-24). Bitterman sought injunctive relief, exemplary damages, and court costs and actual attorney fees against Ms. Bolf under MCL 15.273. (*Id*. at ¶ 25 a-d). Bolf filed an answer, the thrust of which was to deny liability.

During the course of discovery, Bitterman's counsel inquired during the depositions of Bolf and non-party witness Trustee Lorencz about the subject matter of the closed session. Defense counsel advised both Bolf and Lorencz not to answer questions about this topic on the basis of privilege, pursuant to MCR 2.306(C)(5)(a). In the defense's view, because Michigan law protects closed session meeting minutes from disclosure, questions regarding the content of closed meeting minutes fit squarely within "privilege and other legal protection" to be preserved. MCL 15.267(2). Bolf asserted that the information was not relevant nor reasonably calculated to lead to the discovery of relevant evidence, as the minutes at issue were of the open meeting, not the closed session, and that Bitterman was attempting to gain evidence for use in another case where the Court had ordered limitations on discovery. Bitterman moved to compel answers to those questions by way of new depositions, but the circuit court denied her request. (Exhibit E, Opinion and Order of the Court, 9/18/13). In its order, the court found that the privilege had been properly asserted by Bolf and Lorencz[4] and

[4] It should be noted that Mr. Lorencz was never served with a copy of the Motion or provided notice of the hearing.

that Bitterman was attempting to circumvent the discovery order in the related case. (Exhibit E, Opinion and Order of the Court, 9/18/13).

Bitterman subsequently sought summary disposition on the basis that the Clerk intentionally violated the Open Meetings Act by altering official minutes of a meeting held by the Village Council. (Exhibit C, Brief in Support of Plaintiff's Motion for Summary Disposition, p 10). According to Bitterman, the Clerk is a public official because the clerk is responsible for being the official recordkeeper of the Village Council. Bitterman argued that Bolf is responsible for recording the proceedings and resolutions of the council under state law, and that the Open Meetings Act requires the Village Council to keep minutes of its meetings. Finally, Bitterman contended that specific intent to violate the Act could be inferred from the fact that Bolf attended a training on the Open Meetings Act, the Act requires corrections to minutes to be made a public meetings, and Bolf failed to return to the Village Council later to seek a vote to amend the "admittedly unauthorized version of the minutes" that Bitterman challenged. (*Id*., pp 10-12).

Bolf also moved for summary disposition in her favor, arguing that Bitterman was unable to establish at least two of the three elements necessary to hold her liable under the Act. (Exhibit D, Defendant Bolf's Motion for Summary Disposition, 8/12/13). Specifically, Bolf explained that she was not a public official subject to the Act and did not intentionally violate the Act. (*Id*.).

The Saginaw County Circuit Court agreed with Bolf, granting summary disposition in her favor and denying Bitterman's motion. (Exhibit F, Opinion and Order of the Court, 10/29/13). The circuit court agreed that a village clerk is not a "public official" within the meaning of the Open Meetings Act. (*Id*., pp 3-7). In so ruling, the circuit court looked to *People v Whitney*, 228 Mich App 230, 240; 578 NW2d 329 (1998), wherein this Court identified the elements that must be proven to establish a violation of the Act for purposes of criminal liability under § 12 of the Act, which uses identical language as § 13. (*Id*., pp 3-4). Further, the circuit court concluded that Bolf was not a member of the village council which is the subject to the Act, as provided by statute. (*Id*., p 7). Accordingly, the circuit court did not need to address whether Bolf intentionally violated the Act.

Bitterman moved for reconsideration of the circuit court's opinion and order, but that motion was denied. (Exhibit G, Order Denying Reconsideration, 12/2/13). Bitterman also moved for peremptory reversal in this Court, but was similarly unsuccessful. (Exhibit H, Order, 1/30/14).

After full briefing and oral argument, the Michigan Court of Appeals upheld the lower court decision in all respects. The Court of Appeals reviewed various provisions of the Open Meetings Act including those establishing the obligation for a public body to keep minutes of its meetings, the provision that Bitterman sought to use as the basis for her substantive challenge against Bolf. The Court of Appeals concluded that a

dictionary was not necessary to define the term "public official" because the Court already interpreted that phrase within the meaning of the statute in *People v Whitney*, and the Legislature intended the term "public official" to encompass members of public bodies. The Court of Appeals reasoned that both statutory sections are part of the same act, they should be construed together, and the operative language is almost identical. The Court concluded that Bolf, who was not a member of the council and did not vote at the meetings, was not a "public official" within the meaning of the Act.

Bitterman now seeks to challenge this decision and urges this Court to grant leave to appeal.

COUNTER-STATEMENT OF THE STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Under MCR 2.116(C)(10), the motion tests the factual adequacy of a complaint on the basis of the entire record, including affidavits, depositions, admissions, or other documentary evidence. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The trial court in deciding the motion must view the substantively admissible evidence submitted up to the time of the motion in a light most favorable to the party opposing the motion. *Maiden v Rozwood*, 461 Mich 109, 120–121; 597 NW2d 817 (1999). "Summary disposition is appropriate ... if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183; 665 NW2d 468.

Questions of law, including statutory interpretation, are reviewed de novo on appeal. *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 369; 803 NW2d 698 (2010).

Finally, a trial court's decision to grant or deny discovery is reviewed for an abuse of discretion. *Shinkle v Shinkle (On Rehearing)*, 255 Mich App 221, 224; 663 NW2d 481 (2003). The preliminary issue of whether information is privileged is a question of

law reviewed de novo. (*Id*.; *Koster v June's Trucking, Inc*., 244 Mich App 162, 166; 625 NW2d 82 (2000)).

ARGUMENT

Leave To Appeal Is Properly Denied (A) Where, Under The Plain Language Of MCL 15.261 *et seq*., And *People v Whitney*, 228 Mich App 230, 253; 578 NW2d 329 (1998), A City Clerk Is Not A Public Official Subject To The Open Meetings Act Because The Clerk Is Not A Member Of A Public Body As Defined In The Act (B) And In Any Event The Judgment Is Properly Upheld On The Alternate Ground That There Is No Proof That Bolf Intended To Violate The Act.

Both at the circuit court level, in the Court of Appeals, and in its application for leave to appeal to this Court, Bitterman fails to establish at least two of the three elements necessary to hold Cheryl Bolf liable under the Open Meetings Act. As Village Clerk, Ms. Bolf is not a public official subject to the Open Meetings Act. Furthermore, she did not act with the intent to violate the Open Meetings Act. Instead, she sought to fulfill her obligation as Clerk to provide the public with an accurate and true account of what occurred during the meeting—the very purpose of the Open Meetings Act. *Herald Co, Inc v Tax Tribunal*, 258 Mich App 78, 83; 669 NW2d 863 (2003) (quoting *Kitchen v Ferndale City Council*, 253 Mich App 115, 125; 654 NW2d 918 (2002)) ("The purpose of the OMA is to promote governmental accountability by facilitating public access to official decision making and to provide a means through which the general public may better understand issues and decisions of public concern."). The Clerk's corrections to the minutes were made openly and with the best of intentions. She was entitled to summary disposition as a matter of law, and the circuit court properly granted judgment in her favor. The ruling is properly affirmed by this Court.

A. The circuit court correctly granted summary disposition in favor of the clerk because she is not a member of a public body subject to liability under the Act.

This action was filed pursuant to MCL 15.273, which states, in pertinent part:

> A public official who intentionally violates this act shall be personally liable in a civil action for actual and exemplary damages of not more than $500.00 total, plus court costs and actual attorney fees to a person or group of persons bringing the action.

Michigan state courts have not addressed the showing necessary to state a claim pursuant to MCL 15.273. However, this Court has confirmed the elements to be proven with regard to a charge under the criminal provision of the statute, which contains exactly the same language.[5] *People v Whitney*, 228 Mich App 230; 578 NW2d 329 (1998). While Bitterman asserts on appeal reliance on *Whitney* is misplaced, this Court specifically noted in *Whitney* that "[i]t would not be sensible for the same provision in the OMA to have one meaning in a civil case and another in a criminal case." (*Id*. at 244). Given the identical language of the civil and criminal provisions of the OMA, it may be safely presumed that Legislature intended the same showing be made regardless of whether a criminal charge or a civil claim was being pursued.[6] (*Id.).* See *Robinson v City of Lansing,* 486 Mich 1, 17; 782 NW2d 171 (2010) ("[u]nless the Legislature indicates otherwise, when it repeatedly uses the same phrase in a statute, that phrase

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[5] MCL 15.272(1) states: "A public official who intentionally violates this act is guilty of a misdemeanor punishable by a fine of not more than $1,000.00."

[6] Bitterman concurs in this conclusion. (See Exhibit C, Plaintiff's Brief in Support of Motion for Summary Disposition, p 9) (citing *Whitney, supra*).

should be given the same meaning throughout the statute.") See also, *Hannay v Dept of Transportation*, 497 Mich 45, 61-62; 860 NW2d 67 (2014).

Accordingly, in order to establish her claim, Bitterman must establish the elements set forth by the Court of Appeals in *Whitney*:

> Thus, on the basis of the plain language of § 12(1), we conclude that…intentionally violating the OMA consists of three elements: (1) the defendant is a member of a public body, (2) the defendant actually violated the OMA in some fashion, and (3) the defendant intended to violate the OMA.

(Id. at 253). Bitterman failed to do so, because the Clerk of the Village of Oakley is not a member of a public body as defined in the Act and because Bitterman offered no evidence, nor could she, that Bolf intended to violate the Act.

1. The Michigan Legislature's definition of "public body" does not include Bolf since the clerk is not a member of the Village of Oakley Board of Trustees.

Bitterman's challenge to the circuit court's conclusion that Bolf was not a member of a "public body" is easily disposed of. The term "public body" has a specifically defined meaning in the Open Meetings Act, as follows:

> "Public body" means any state or local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council, that is empowered by state constitution, statute, charter, ordinance, resolution, or rule to exercise governmental or proprietary authority or perform a governmental or proprietary function; a lessee of such a body performing an essential public purpose and function pursuant to the lease agreement; or the board of a nonprofit corporation formed by a city

> under section 4o of the home rule city act, 1909 PA 279, MCL 117.4o. MCL 15.262(a).

Ms. Bolf is not a member of the Village's Board of Trustees, its "local legislative or governing body" and therefore is not a "public official." She therefore cannot be held liable under MCL 15.273. (*Id.).*

Ritchie v Coldwater Community Sch, No 11-530, 2012 WL 2862037 (WD Mich July 11, 2012) (unpublished) (Exhibit D-5), is instructive on this issue and highlights the error in Bitterman's reasoning. The plaintiff in *Ritchie* claimed, among other things, violations of the Open Meetings Act pursuant to MCL 15.273 by superintendents of a school district who were not members of the school's board. (*Id.* at *21). The question raised was "whether, for purposes of the OMA, a superintendent can be a 'public official' within the meaning of the Open Meetings Act without being a member of a 'public body.'" (*Id.).* The Court ruled in the negative and found the superintendents were not proper defendants to an action under MCL 15.273, relying on *Whitney, supra*:

> *Whitney* dealt with a criminal prosecution under Section 12 of the OMA, MCL § 15.272, which makes an intentional violation by a "public official" a misdemeanor offense. In defining the elements of the offense, the court stated that the prosecutor must prove: "(1) the defendant is a member of a public body, (2) the defendant actually violated the OMA in some fashion, and (3) the defendant intended to violate the OMA." (*Id.* at 253, 578 NW2d at 340). Although the court did not conduct an extensive analysis of the statute, it purported to apply the plain meaning of the pertinent language. (*See id*.).
>
> Although *Whitney* involved the criminal provision of the OMA, both Section 12 and its civil counterpart, Section 13, use the same "public official" language. Moreover, the *Whitney* court's conclusion that a

> defendant must be "a member of a public" body is consistent with the purpose the OMA, which is to ensure public access to official decision-making of public bodies. In this regard, Section 11, MCL § 15.271, authorizes a person to sue a public body for noncompliance, while Sections 12 and 13 authorize criminal and civil actions against the individual public body members for intentional violations. Accordingly, the Court concludes that Section 13, like Section 12, applies only to members of public bodies. (*Id.* at *21-22).

Like the superintendents in *Ritchie*, who were not members of the school board, Cheryl Bolf is not a member of the Village of Oakley's Board of Trustees. She does not sit on the Board and does not have a vote. (Exhibit D-1, p. 27-28). While Bitterman argues on appeal that voting rights are not a prerequisite to finding that an individual is a "public official" (Appellant Brief, p 18), *Ritchie* and *Whitney* compel the opposite conclusion. Further, the General Law Village Act expressly defines the public body, and does not include a village clerk in that definition: "The present and trustees constitute the council." MCL 62.1(1). Bolf is not a member of a public body regulated under the Act. She, therefore, cannot be held liable for an alleged violation of the Open Meetings Act under MCL 15.273 and was properly granted summary disposition.

2. Bitterman's arguments are inconsistent with the language in the Open Meetings Act and the General Law Village Act.

Bitterman erroneously contends that the Clerk's admission that she is a "public official responsible for the creation and maintenance of these minutes as well as the proceedings and resolutions of council," equates to an admission that she is a public official for purposes of the Open Meetings Act. (Appellant Brief, p 16, n 10, quoting

Exhibit B, Bolf's Answer to the Complaint, p 12). Bitterman seeks to couple provisions in the Open Meetings Act discussing the minutes, MCL 15.267(1), with statutory provisions governing the position of clerk in a general law village, including MCL 62.1, *et seq*. But these provisions do not create liability for village clerks under the Open Meetings Act, which is directed to public bodies and their members. *People v Whitney*, 228 Mich App 230 (1998).

The duties and requirements set forth in the Open Meetings Act are imposed upon public bodies and their members, not other office holders or officials. For example, MCL 15.263 concerns meetings, decisions, and deliberations of a "public body," public attendance of a meeting of a "public body," public address at the meeting of a "public body" and rules "established and recorded by the public body." MCL 15.264 and MCL 15.265 set forth meeting notice requirements to be given by a "public body." MCL 15.266 requires a "public body" to provide copies of the notice to those requesting it. MCL 15.267 and MCL 15.268 govern when and how a "public body" may hold a closed session.

Notably, the section discussing the minutes of a public body, likewise, speaks to duties and obligations of the public body. MCL 15.269 provides:

> (1) Each public body shall keep minutes of each meeting showing the date, time, place, members present, members absent, any decisions made at a meeting open to the public, and the purpose or purposes for which a closed session is held. The minutes shall include all roll call votes taken at the meeting. The public body shall make any corrections in the minutes at the next

> meeting after the meeting to which the minutes refer. The public body shall make corrected minutes available at or before the next subsequent meeting after correction. The corrected minutes shall show both the original entry and the correction.
>
> (2) Minutes are public records open to public inspection, and a public body shall make the minutes available at the address designated on posted public notices pursuant to section 4. The public body shall make copies of the minutes available to the public at the reasonable estimated cost for printing and copying.
>
> (3) A public body shall make proposed minutes available for public inspection within 8 business days after the meeting to which the minutes refer. The public body shall make approved minutes available for public inspection within 5 business days after the meeting at which the minutes are approved by the public body.
>
> (4) A public body shall not include in or with its minutes any personally identifiable information that, if released, would prevent the public body from complying with section 444 of subpart 4 of part C of the general education provisions act, 20 USC 1232g, commonly referred to as the family educational rights and privacy act of 1974.

Each duty or legal obligation set forth in the Open Meetings Act is directed toward the "public body". Thus, the plain language reflects the Legislature's intent that the law hold public bodies, and their members, liable.

The Open Meetings Act provisions that Bitterman relies on to try to impose liability onto the Clerk specifically contemplate liability for a "public official who intentionally violates *this act*…." (italics added). MCL 15.272 and MCL 15.273 both include this phrase when defining the circumstances in which a "public official" may be held liable. Liability "under this act" does not include any potential liability for a

"public official" or other individual who is NOT a member of a "public body." And contrary to Bitterman's assertion that the Clerk should be deemed a member of a public body because MCL 64.5 makes "the clerk the clerk of the council" and requires the clerk "to attend its meetings" (Appellant Brief, p 18), the clerk is not a member of the council. In fact, the Legislature made this explicitly clear in MCL 62.1, which provides that "[t]he president and trustees constitute the council." Thus, the clerk is clearly not a member of the council, which is the public body that might be sued under the Open Meetings Act.

Bitterman attempts to buttress her argument by citing the definition of a "public official" in Black's Law Dictionary and case law. (Appellant Brief, pp 14-15). But this argument is specious. The question is not whether Bolf, as clerk, is a public official within the meaning of the law, generally; it is whether she was a member of a "public body" governed by the Open Meetings Act, who intentionally violated the Act. The plain language of the Open Meetings Act imposes duties only on public bodies as defined in MCL 15.262(a). The liability sections of the Open Meetings Act, MCL 15.272 and MCL 15.273 allow liability only on "a public official who intentionally violates this act…." This means that public officials who, as members of public bodies governed by the Act, intentionally violate it, can be held liable.

The Clerk is not a member of the Village of Oakley council, which state law specifically includes the president and trustees, and not the clerk. MCL 62.1.[7] Thus, the Clerk cannot be liable under the Open Meetings Act.

Bitterman points to *Burnett v Moore*, 111 Mich App 646; 314 NW2d 458 (1981), to support her position that a village clerk fits within the definition of a "public official." (Appellant Brief, pp 16-17). However, this argument lacks merit for three reasons. First, *Burnett* was decided in 1981 and is not precedentially binding. MCR 7.215(J)(1) (stating that the Court is only required to follow "prior published decision[s] of the Court of Appeals issued on or after November 1, 1990…"). Second, *Burnett* was an assault and battery case brought against an off-duty state police officer and therefore is completely inapplicable to this Open Meetings Act claim. The *Burnett* Court's discussion of elements to distinguish a "public official" versus an "ordinary government employee" for jurisdictional purposes is not instructive here, where the issue is whether an individual is a member of a public body and thus someone to be deemed a "public official" for purposes of liability under the Open Meetings Act. Finally, Bitterman overlooks that the *Burnett* Court concluded that the defendant in that case was *not* a state official, consistent with legislative intent.

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[7] Bitterman's explicit assertion that MCL 64.5 makes the clerk a member of the village council is patently mistaken. It does not. The statute merely provides that the clerk is "the clerk of the council" and is to attend council meetings. Indeed, MCL 62.1, another provision of the General Law Village Act, expressly provides that the "president and trustee shall constitute the council."

In sum, as this Court has already determined in *Whitney* and the federal district court held in *Ritchie*, the Clerk may not be held individually liable under the Open Meetings Act since it does not impose any legal duties on to clerks, but only onto public bodies, and their members. Therefore, the circuit court judge was correct. This Court need go no further to affirm the grant of summary disposition in Bolf's favor.

B. Alternatively, Bitterman failed to establish the requisite intent necessary to sustain a violation of the Open Meetings Act.

This Court can alternatively affirm[8] the dismissal Bitterman's claim against the Clerk on the alternate basis that she did not intend to violate any laws when she corrected the minutes. The Clerk sought to comply with her role under MCL 64.5, which requires the clerk to "record all proceedings and resolutions of the council…."

The Open Meetings Act itself provides no guidance on correcting erroneous minutes after they have been approved. MCL 15.261 *et seq*. Instead, it requires that corrections to the minutes be made "at the next meeting after the meeting to which the minutes refer." MCL 15.269(1). That could no longer occur, because the error was not brought to Ms. Bolf's attention until after the meeting was over and they were closing

[8] The trial court did not reach the issue of whether Bolf intended to violate the Open Meetings Act, concluding that the village clerk is not a public official to which the Act applies. However, under the "right result, wrong reason" doctrine of appellate advocacy, the lack of intent to violate the Act serves as an additional reason for this Court's affirmance. See *Miller-Davis Co v Ahrens Constr, Inc (On Remand)*, 296 Mich App 56, 74; 817 NW2d 609 (2012) (this Court "will affirm the trial court when it reaches the right result even if it does so for the wrong reason.").

up the hall. (Exhibit D-1, p 20). Ms. Bolf had never experienced this situation before, the statute did not provide guidance and she was not sure what to do.

Ms. Bolf accordingly turned to the Village President, Douglas Shindorf, who has served on the Village Board of Trustees for more than 30 years, for direction. He instructed her to make the changes so that the minutes would be accurate. (Exhibit D-1, pp 19-20). Ms. Bolf believed it was her duty as Clerk to provide the public with correct and accurate minutes so that the record would reflect what was done. (Exhibit D-1, pp 20-21). So that everyone would be aware that changes had been made to the minutes, the December meeting minutes indicated that the November minutes had been accepted "as read with corrections" thus notifying any person reviewing the minutes that changes had been made from the original November meeting minutes. (Exhibit D-4, emphasis added).[9] At all times, Ms. Bolf acted with the intent to inform the public of the actions of the Village of Oakley's governing board.

This conduct does not equate with the specific intent necessary under the statute. As clarified in *Whitney, supra,* "under Michigan law, no lesser amount of recklessness or even deliberate ignorance suffices to replace the requisite specific intent that is essential to commit a specific intent crime." (*Id.* at 256). Ms. Bolf had no knowledge that her actions could even be construed as an alleged violation of the Open Meetings Act—the

[9] In any event, given the fact that the corrections were indicated at a later public meeting, no violation occurred under the Open Meetings Act.

Act did not specify the means for correcting the error at issue or set forth what is to be done when minutes are not timely corrected.[10] The Clerk was attempting to fulfill her role as clerk and the Open Meetings Act's purposes, not to circumvent them. Likewise, there is no evidence of any intent by Ms. Bolf to violate the Open Meetings Act. Her actions were taken in good faith and at the direction of the Village President, who had more than 30 years of service on the Board.

In an implicit acknowledgment of the complete absence of proof that the Clerk intended to violation the Open Meetings Act, Bitterman urged the circuit court to infer specific intent from the alleged "failure to return to the Village Council to seek a vote to amend the now admittedly unauthorized version of the minutes of the November Meeting." (Exhibit C, Plaintiff's Brief in Support of Summary Disposition, p 11). But taking a vote on minutes is an act that can only be done by members of the body, not the Clerk, who is not a member of the council. This argument is further belied by the fact that Bolf was notified of the issue by one Board member, sought guidance from the President of the Board, and noted in the December meeting minutes that corrections had been made to the November minutes. Clearly, the Board was aware or should have been aware that changes had been made. Plaintiff's argument fails to provide any

[10] Again, these obligations are those of the "public body" (i.e., the Board), rather than Bolf's. Nevertheless, Bolf acted in good faith and for the purpose of providing the public with accurate minutes.

support for Bitterman's position; the facts do not support an inference that the Clerk intended to violate the Open Meetings Act.

Bitterman's reliance on Bolf's clerking training to attempt to establish an intent to violate the Open Meetings Act is misplaced. (See Appellant Brief, p 2). According to Bitterman, Bolf was trained for various clerk duties, to include the taking of accurate minutes. (*Id*.). If anything, this supports her conduct, which was an attempt to ensure the accuracy of the minutes. And it certainly offers no support for an inference that the Clerk intended to violate the Open Meetings Act.

CONCLUSION

WHEREFORE, Defendant-Appellee Cheryl Bolf respectfully requests this Court affirm the circuit court's grant of summary disposition in her favor, and grant her all other relief that is proper in law and equity.

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